Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

In the Matter of)	
)	
Applications of Sprint Nextel Corporation,)	
Transferor, and SoftBank Corp., and Starburst)	IB Docket No. 12-343
II, Inc., Transferees, for Consent to Transfer of)	
Control of Licenses and Authorizations)	

OPPOSITION OF CLEARWIRE CORPORATION

Clearwire Corporation ("Clearwire"), pursuant to Sections 1.45(b) and 1.106(g) of the Commission's rules, ^{1/} hereby submits its Opposition to the Petition for Reconsideration ("Petition") filed by Crest Financial Limited ("Crest") in the above-captioned proceeding, challenging the FCC's December 12, 2012, approval of Clearwire's applications for *pro forma* transfer of control (the "Applications"). ^{2/} The Petition was improperly filed in this proceeding, which was established to consider not the Applications, but rather the transfer of control of various authorizations held by Sprint Nextel Corporation ("Sprint") to SOFTBANK CORP. ("SoftBank") and Sprint's acquisition of the stock of Clearwire that it does not already own. ^{3/} The Petition should therefore be promptly dismissed from this proceeding. ^{4/}

The Commission's rules provide two options for filing petitions for reconsideration against actions taken in response to requests like the Applications, which were processed via the

See 47 C.F.R. §§ 1.45(b), 1.106(g).

See Applications of Clearwire Corporation for *Pro Forma* Transfer of Control, ULS File Nos. 0005480932, *et al.* (filed Nov. 15, 2012) ("Applications").

See SoftBank and Sprint File Amendment to Their Previously Filed Applications to Reflect Sprint's Proposed Acquisition of De Facto Control of Clearwire, Public Notice, DA 12-2090 (rel. Dec. 27, 2012).

On January 11, 2013, Crest also filed its Petition in the ULS. For the reasons set out in Clearwire's separate Opposition filed in the ULS (the "Clearwire ULS Opposition"), the Petition lacks any merit and should be denied. A copy of the Clearwire ULS Opposition is attached hereto.

Uniform Licensing System ("ULS"): (1) a party can file its petition manually (*i.e.*, on paper) with the Secretary's Office, with the petition referencing the ULS file numbers of the applications at issue, or (2) the party can file the petition electronically via ULS using the relevant ULS application file numbers.^{5/} The instant Petition meets neither requirement.

The Commission's rules also provide that "petitions for reconsideration of delegated authority actions taken by the [Wireless] Bureau regarding license applications may be dismissed as procedurally defective" if they fail to meet certain "minimum criteria." Such criteria include filing the petition either manually at the FCC or electronically via ULS in the proper proceeding and filing within the 30-day deadline. The Commission has routinely dismissed petitions for reconsideration that fail to meet these criteria. The Commission should similarly dismiss Crest's misfiled Petition in IB Docket No. 12-343.

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See 47 C.F.R. § 1.51(f) ("For application and licensing matters involving the Wireless Radio Services, pleadings, briefs or other documents may be filed electronically in ULS, or if filed manually, one original and one copy of a pleading, brief or other document must be filed.").

Wireless Telecommunications Bureau Revises and Begins Phased Implementation of its Unified Policy for Reviewing License Applications and Pleadings, Public Notice, 14 FCC Rcd 11182 (1999) (noting that each petition, pursuant to Section 1.106 of the FCC's rules, must be filed manually at the FCC or electronically via the ULS when the capability becomes available); see also Wireless Telecommunications Bureau Enhances the Commission's Universal Licensing System to Implement Electronic Filing for Pleadings, Public Notice, 21 FCC Rcd 424 (2006) (announcing the capability to file pleadings, including petitions for reconsideration, via ULS).

See, e.g., Letter from Scot Stone, Deputy Chief, Mobility Div., WTB, to Mr. Thomas R. Morrison, 24 FCC Rcd 5805 (2009) (finding that "the petition was filed in the wrong location"); Letter from Scot Stone, Deputy Chief, Mobility Div., WTB, to Joshua E. Pearse, 24 FCC Rcd 4094 (2009) (dismissing the petition pursuant to the Commission's filing location and deadline requirements); see also Thomas K. Kurian, Assignor, AMTS Consortium, LLC, Assignee, Application for Consent to the Partial Assignment of the License for Public Coast Station WQCP809, Order on Further Reconsideration, 22 FCC Rcd 13223, ¶ 3 (2007); Letter from Scot Stone, Deputy Chief, Mobility Div., WTB, to ACR Electronics, Inc., 22 FCC Rcd 20962 (2007); Application of Byron Public School District # 531 for Renewal of Education Broadband Service Station WLX511, Order on Reconsideration, 21 FCC Rcd 13777, ¶ 4 (2006); San Mateo County Transit District, Order on Reconsideration, 16 FCC Rcd 7081 (2001).

Respectfully submitted,

Howard J. Symons Russell H. Fox Angela Y. Kung

MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, PC 701 Pennsylvania Ave., NW Suite 900 Washington, DC 20004 (202) 434-7300 HJSymons@mintz.com

Counsel for Clearwire Corporation

January 14, 2013

/s/ Cathleen A. Massey____

Cathleen A. Massey Nadja Sodos-Wallace

CLEARWIRE CORPORATION 1250 I Street, N.W. Suite 901 Washington, D.C. 20005 (202) 351-5033 cathy.massey@clearwire.com

CERTIFICATE OF SERVICE

I, Angela Y. Kung, do hereby certify that on this 14th day of January, 2013, I caused a copy of the foregoing Opposition of Clearwire Corporation, to be served by electronic mail on the following:

Viet D. Dinh
H. Christopher Bartolomucci
Jeffrey M. Harris
Stephen V. Potenza
Brian J. Field
BANCROFT PLLC
1919 M Street, NW, Suite 470
Washington, DC 20036
vdinh@bancroftpllc.com
Counsel for Crest Financial Limited

Kathleen M. H. Wallman WALLMAN CONSULTING, LLC 9332 Ramey Lane Great Falls, VA 22066 wallmank@wallman.com

Regina M. Keeney Lawler, Metzger, Keeney & Logan, LLC 2001 K Street, NW, Suite 802 Washington, DC 20006 gkeeney@lawlermetzger.com Counsel for Sprint

John R. Feore
Dow Lohnes P.L.L.C.
1200 New Hampshire Avenue, NW, Suite 800
Washington, DC 20036
jfeore@dowlohnes.com
Counsel for Softbank Corp. and Starburst I, Inc. and Starburst II, Inc.

/s/ Angela Y. Kung
Angela Y. Kung
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004
(202) 434-7300

ATTACHMENT

Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

In the Matter of)	
)	
Applications of Clearwire Corporation for <i>Pro</i>)	File Nos. 0005480932, et al.
Forma Transfer of Control)	

OPPOSITION OF CLEARWIRE CORPORATION

Howard J. Symons Russell H. Fox Angela Y. Kung

MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, PC 701 Pennsylvania Ave., NW Suite 900 Washington, DC 20004 (202) 434-7300 HJSymons@mintz.com

Counsel for Clearwire Corporation

January 14, 2013

Cathleen A. Massey Nadja Sodos-Wallace

CLEARWIRE CORPORATION 1250 I Street, N.W. Suite 901 Washington, D.C. 20005 (202) 351-5033 cathy.massey@clearwire.com

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Clearwire Corporation ("Clearwire"), pursuant to Sections 1.45(b) and 1.106(g) of the Commission's rules, ^{8/} hereby submits its Opposition to the Petition for Reconsideration ("Petition") filed by Crest Financial Limited ("Crest") challenging the FCC's December 12, 2012, approval of Clearwire's applications for *pro forma* transfer of control (the "Applications"). ^{9/} Crest's Petition provides no credible basis for the FCC to reverse its actions. Accordingly, the Petition should be promptly denied.

I. INTRODUCTION AND SUMMARY

The Applications sought consent for Sprint Nextel Corporation ("Sprint") to increase its ownership interest in Clearwire from 48.15 percent to greater than 50 percent ^{10/} by acquiring Clearwire shares from Eagle River Holdings, LLC ("ERIV"). Because the proposed transaction enabled Sprint to reacquire *de jure* control of Clearwire but did not confer *de facto* control, it

Applications of Clearwire Corporation for *Pro Forma* Transfer of Control, ULS File Nos. 0005480932, *et al.* (filed Nov. 15, 2012) ("Applications"). On January 4, 2013, Crest improperly filed its Petition in IB Docket No. 12-343, the proceeding related to the SoftBank Transaction and the Clearwire Merger Agreement (as those terms are defined below). For the reasons set out in Clearwire's separate Opposition to that filing (the "Clearwire IB Opposition"), it should be dismissed. A copy of the Clearwire IB Opposition is attached hereto.

See 47 C.F.R. §§ 1.45(b), 1.106(g).

See Applications, Exh. A at 1. As the Applications explain, Clearwire was unable to state the precise level of ownership interest that Sprint would have after the proposed transaction and it therefore sought permission to increase Sprint's ownership interest to greater than 50 percent.

required only *pro forma* FCC approval.^{11/} On December 12, 2012, the Wireless Telecommunications Bureau ("Wireless Bureau") released a public notice announcing that the Applications had been granted.^{12/} The parties consummated the transaction that same day.^{13/}

Separately, Sprint, together with SOFTBANK CORP. ("SoftBank"), filed applications on November 15, 2012, seeking Commission consent to the transfer of control of various authorizations held by Sprint to SoftBank pursuant to a merger agreement by which SoftBank would acquire an approximately 70 percent controlling interest in Sprint ("SoftBank Transaction"). The Commission released a public notice on November 30, 2012, seeking comment on the SoftBank Transaction. 15/

Subsequently, on December 17, 2012, Sprint and Clearwire entered into a merger agreement by which Sprint would acquire the stock of Clearwire that it does not already own, giving Sprint 100 percent stock ownership in, and *de facto* control of, Clearwire ("Clearwire Merger Agreement"). As a result of the Clearwire Merger Agreement, Sprint and SoftBank amended their pending transfer of control applications on December 20, 2012. In response to this amendment, the Commission released a public notice on December 27, 2012, amending the pleading cycle and seeking comment on the proposed SoftBank Transaction together with the

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See Applications, Exh. A at 1.

See Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications, Designated Entity Reportable Eligibility Event Applications, and Designated Entity Annual Reports, Public Notice, Report No. 8300, at 9 (rel. Dec. 12, 2012).

See Notice of Consummation of Clearwire Corporation, ULS File No. 0005547899 (filed Dec. 12, 2012).

See, e.g., Applications of Sprint Nextel Corporation, SOFTBANK CORP., and Starburst II, Inc. for Consent to Transfer of Control, ULS File No. 0005483246, et al., at Public Interest Statement (filed Nov. 15, 2012).

See SoftBank and Sprint Seek FCC Consent to the Transfer of Control of Various Licenses, Leases, and Authorizations from Sprint to SoftBank, and to the Grant of a Declaratory Ruling Under Section 310(b)(4) of the Communications Act, Public Notice, DA 12-1924 (rel. Nov. 30, 2012).

related Clearwire Merger Agreement. 16/ These proposed transactions remain pending before the Commission.

Crest's Petition erroneously asserts that the ERIV-Sprint transaction constituted a substantial transfer of control that gave Sprint *de facto* as well as *de jure* control over Clearwire by enabling Sprint to nominate non-independent candidates to Clearwire's Board of Directors (the "Board") seats, ^{17/} and that it should therefore be subject to public comment and reviewed "in connection with" the Clearwire Merger Agreement and the SoftBank Transaction. ^{18/} The Petition lacks any merit and should be promptly denied.

Grant of the Applications did not give Sprint *de facto* control over Clearwire or the unilateral ability to approve the Clearwire Merger Agreement, and therefore did not amount to a substantial transfer of control of Clearwire to Sprint. To the contrary, the very provision in the Clearwire Equityholders' Agreement ("EHA")^{19/} relied on by Crest in its Petition expressly requires a majority of *disinterested* Clearwire directors, *i.e.*, directors without a direct or indirect material interest in the particular Related Party Transaction, to approve the Clearwire Merger Agreement precisely *because* it is a Related Party Transaction. Crest's argument misstates this critical provision of the EHA, which is the primary basis for its argument that the Applications

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See SoftBank and Sprint File Amendment to Their Previously Filed Applications to Reflect Sprint's Proposed Acquisition of De Facto Control of Clearwire, Public Notice, DA 12-2090 (rel. Dec. 27, 2012), at 3 ("December 27 Public Notice").

^{17/} *See* Petition at 1-2, 6-10.

^{18/} *Id.* at 11.

See Equityholders' Agreement By and Among Clearwire Corporation, et al. (dated Nov. 28, 2008) ("EHA").

conveyed *de facto* control of Clearwire to Sprint. It also ignores the other provisions of the EHA that were unaffected by the Applications.^{20/}

To the extent Crest wishes to challenge the Clearwire Merger Agreement, it must seek relief in another forum. It has done just that in the Delaware Chancery Court. Even assuming that Crest's complaints are also cognizable by the Commission, the FCC has established a proceeding to take comments on the Clearwire Merger Agreement. If Crest believes it has any basis for contesting FCC approval of that transaction, it can lodge its concerns there. The Commission may not, however, review its grant of the Applications based on challenges to an unrelated, subsequent transaction.

II. ARGUMENT

A. The FCC Correctly Treated the Transaction as *Pro Forma* Because There Was No Transfer of *De Facto* Control.

Crest argues that FCC treatment of the Applications as *pro forma* was inappropriate because grant of the Applications resulted in a *de facto* transfer of control to Sprint.^{21/} It claims that by giving Sprint the power to nominate non-independent candidates to a majority of the seats on the Clearwire Board for the first time, the Applications enabled Sprint to control the management of the licensee and in particular to direct approval of the Clearwire Merger Agreement.^{22/}

For example, Section 2.6 of the EHA requires approval of at least 10 of the 13 Clearwire directors for appointment or removal of the Chief Executive Officer and all officers who report directly to the CEO. This requirement further prevented Sprint from obtaining *de facto* control of Clearwire through the ERIV-Sprint transaction.

See Petition at 6.

^{22/} See id. at 8.

Crest's claims are without foundation. As Clearwire has indicated in the past, the EHA vests *de facto* control in Clearwire's management and the Clearwire Board as a whole.^{23/} The grant of the Applications did not change this crucial element of the EHA. Crest nonetheless argues that Sprint obtained *de facto* control when the Applications were granted because Sprint's resulting ability to appoint an additional non-independent director allegedly enabled it to control a majority of the Clearwire Board in any matter requiring a simple majority vote.^{24/} Crest relies heavily – and erroneously – on a provision in the EHA that it claims allows a simple majority vote of the Board to effect "Related Party Transactions" (such as the pending Clearwire Merger Agreement),^{25/} but the provision Crest cites clearly states that such transactions may only be approved by a majority of *disinterested* directors, *i.e.*, directors without a direct or indirect material interest in the particular Related Party Transaction.^{26/} Indeed, the Clearwire Merger Agreement was unanimously approved by Clearwire's Board of Directors only after the

See Clearwire Annual Ownership Report (FCC Form 602) at x ("The Filer is controlled, through an Equityholders' Agreement ('EHA'), by the management and directors of Clearwire Corporation, which exercise de facto control over the Filer."). Moreover, as the FCC itself has noted, negative control of Clearwire rests with "non-Sprint nominated directors and their nominating shareholders." December 27 Public Notice at 2.

To be clear, the Applications *did not increase* the number of members (seven) Sprint can nominate to the Clearwire Board. Rather, it relieved Sprint of the obligation to nominate at least one independent director to ensure that the Clearwire Board has the three independent directors mandated by law because the nominating committee of the Clearwire Board was required to nominate an independent director to fill the seat formerly held by an ERIV nominee. Clearwire explained the effect of the ERIV transaction on the composition of the Clearwire Board in the public interest statement accompanying the Applications. *See* Applications, Exh. A at n. 1 ("The proposed Sprint-ERH transaction would not give Sprint any additional board seats; upon closing of the proposed transaction, however, and to the extent Sprint exercises its board appointment rights, none of the Sprint appointees would be required to be independent because the director currently nominated by Eagle River would become an independent director.").

See Petition at 8-10 (asserting that "[t]he EHA does *not* require a super-majority vote for 'any Related Party Transaction'", but rather "only a simple majority vote", and thus "the EHA do[es] not give the non-Sprint nominated board members 'negative control of Clearwire'").

See id. at 9; EHA § 2.6(a) (requiring "the prior approval of a Simple Majority of the disinterested Directors" for "any Related Party Transaction") (*emphasis added*).

unanimous recommendation of an independent special committee of the Clearwire Board consisting of disinterested directors.^{27/} Grant of the Applications did not provide Sprint with any ability to require Clearwire to approve Related Party Transactions involving Sprint. Grant of the Applications also did not change the EHA requirement for a disinterested Board or stockholder vote prior to undertaking certain corporate actions or affect other EHA provisions that vested *de facto* control in Clearwire's executives and Board.^{28/}

Crest nonetheless argues that Sprint has *de facto* control of Clearwire because "Sprint's majority shareholding also gives Sprint the power to block any proposed or potential alternatives to its plan to buy out Clearwire's minority shareholders."^{29/} Crest is wrong. Veto power does not equal *de facto* control. As the Commission has explained, investors may hold certain "investor protection" rights, such as veto power over "fundamental changes in corporate structure, including merger or dissolution," without creating *de facto* control.^{30/} Although the ERIV transaction allowed Sprint to reacquire a majority interest in Clearwire, it did not give Sprint *de facto* control of Clearwire because of the supermajority restrictions and other limitations in the EHA. As explained in the Applications, Sprint's reacquisition of a *de jure* controlling interest in Clearwire was appropriately processed under *pro forma* procedures given

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Press Release, Clearwire, Sprint to Acquire 100 Percent Ownership of Clearwire for \$2.97 per Share (Dec. 17, 2012), *available at* http://corporate.clearwire.com/releasedetail.cfm?ReleaseID=727143. Moreover, the Special Committee of the Clearwire Board of Directors, composed only of disinterested Directors, was advised in its deliberations by its own independent financial advisors and legal counsel. *See infra* note 25.

With respect to the Clearwire Merger Agreement, Clearwire is seeking the approval of a "majority of the minority" of Clearwire's stockholders to effectuate the transaction. Further, Section 2.7(d) of the EHA and Section 8.2 of Clearwire's articles of incorporation require the approval of 75 percent of Clearwire's shareholders for a change of control transaction like the Clearwire Merger Agreement. Sprint only owns 50.4 percent of the shares of Clearwire. Accordingly, the satisfaction of these requirements is outside of Sprint's control.

Petition at 10.

See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, ¶ 81-82 (1994).

that the Commission previously approved such an interest in 2008.^{31/} The changes in circumstances since 2008 alleged by Crest^{32/} neither eliminate the restrictions on Sprint's governance rights in the EHA, nor, as explained above, give Sprint the ability to "deliver control of Clearwire's spectrum to SoftBank."^{33/}

B. The Only *De Facto* Transfer of Clearwire Is the One Pending Before the Commission Now, in Which the Commission Has Provided Opportunity for Comment.

As Crest admits, it has brought suit in the Court of Chancery of the State of Delaware in an effort to block the SoftBank Transaction and the Clearwire Merger Agreement. This suit demonstrates that Crest's real concern is the pending transactions, not the granted Applications. Unlike the already approved *pro forma* transaction, moreover, the SoftBank Transaction and the Clearwire Merger Agreement would result in a "change in *de facto* control of Clearwire." Accordingly, the Commission has issued Public Notices providing opportunity for public comment, including an extension of the deadline so that parties may file comments specifically on the Clearwire Merger Agreement. Crest has already announced its intent to file in that docket. 36/

Crest argues, without any support, that the FCC would not have treated the ERIV transaction as *pro forma* had it anticipated the subsequently announced Clearwire Merger

See Sprint Nextel Corporation and Clearwire Corporation; Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations, Memorandum Opinion and Order, 23 FCC Rcd 17570 (2008).

See Petition at 10.

^{33/} See id. at 8.

See id. at 2-3, 8.

December 27 Public Notice at 3.

See, e.g., Letter from Viet D. Dinh, Counsel for Crest Financial Limited, to Marlene H. Dortch, IB Docket 12-343 (Dec. 20, 2012).

Agreement.^{37/} Even if the Commission had anticipated the subsequent, and *separate*, merger agreement, however, that would not have converted the Applications to a transfer of *de facto* control. It is well-established that the Commission only considers the transaction before it – not any potential transaction that may occur later. In fact, the Communications Act mandates that the Commission must make individualized determinations on transfer of control and assignment applications. Section 309 of the Act states that "the Commission shall determine, in the case of *each application* filed with it . . . whether the public interest, convenience, and necessity will be served by the granting of such application."^{38/} The Wireless Bureau has similarly made clear that "the Commission's duty [is] to ascertain whether a *particular transfer* or assignment proposal is in the public interest, convenience, and necessity"^{39/} Thus, even if the Commission had known about the Clearwire Merger Agreement when reviewing the *pro forma* Applications, it would have been irrelevant to its consideration of them.

C. Crest's Complaints Are Not Appropriately Addressed by the FCC.

Finally, as noted above, Crest reports that it has brought suit in a Delaware Court against Sprint, Clearwire, and the Clearwire Board concerning the SoftBank Transaction and the Clearwire Merger Agreement. The Petition is little more than an attempt to use the FCC's processes to reassert complaints more appropriately addressed in another forum. The FCC has

See Petition at 8-9.

^{38/} 47 U.S.C. § 309(a) (emphasis added).

Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, N.A., and C-Call Corp, 10 FCC Rcd 3361 ¶ 19 (1995); see also Acquisition of Certain Assets of Cimco Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC, 25 FCC Rcd 3401, n.16 (2010) (citations omitted) (noting that "[a]ny potential public interest harms or benefits related to [a separate transaction involving one of the parties] may be raised in the course of the Commission review of that transaction").

See Petition at 2-3.

routinely stated that it will not adjudicate contractual issues, ^{41/} and the adjudication of securities law matters is beyond the Commission's authority and expertise. With respect to the latter, moreover, the Commission has long held that it must remain neutral with respect to non-FCC related disputes and that the FCC will not allow its transfer of control procedures to be used to favor one party over another in corporate takeovers. ^{42/} In such matters, the Commission's objective has been to "maintain a position of regulatory neutrality" in which its administrative processes are not "utilized in a manner which favors either the incumbent or the challengers in disputes over corporate control." The FCC is simply the wrong forum for Crest to assert its claims.

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See, e.g., Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement, Memorandum Opinion and Order, 25 FCC Rcd 8704 (2010) (stating that contractual disputes are "matters in which the Commission ordinarily does not become involved"); Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, ¶ 214 (2008).

See, e.g., Tender Offers and Proxy Contests, Policy Statement, 59 Rad. Reg. 2d (P & F) 1536, 1558 (1986).

Application of LIN Broadcasting Corporation (Transferor) and LIN Television Corporation (Transferee) for Transfer of Control of the Licenses of WAND(TV), Decatur, Illinois W68AA, Danville, Illinois WAVY-TV, Portsmouth, Virginia WOTV(TV), Grand Rapids, Michigan WISH-TV, Indianapolis, Indiana WANE-TV, Fort Wayne, Indiana KXAS-TV, Fort Worth, Texas KXAN-TV, Austin, Texas, Order, DA 89-726, ¶ 5 (rel. June 28, 1989).

Graphic Scanning Stockholders for Independent Management; Consolidated Application for Pro Forma Transfer of Control of Graphic Scanning Corp. and Its Subsidiaries, Memorandum Opinion and Order, 1986 FCC Lexis 3733, ¶ 5 (1986).

III. CONCLUSION

For the foregoing reasons, Clearwire respectfully requests that the FCC promptly deny the Crest's Petition for Reconsideration.

Respectfully submitted,

Howard J. Symons Russell H. Fox Angela Y. Kung

MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, PC 701 Pennsylvania Ave., NW Suite 900 Washington, DC 20004 (202) 434-7300 HJSymons@mintz.com

Counsel for Clearwire Corporation

January 14, 2013

/s/ Cathleen A. Massey
Cathleen A. Massey
Nadja Sodos-Wallace

CLEARWIRE CORPORATION 1250 I Street, N.W. Suite 901 Washington, D.C. 20005 (202) 351-5033 cathy.massey@clearwire.com

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Viet D. Dinh
H. Christopher Bartolomucci
Jeffrey M. Harris
Stephen V. Potenza
Brian J. Field
BANCROFT PLLC
1919 M Street, NW, Suite 470
Washington, DC 20036
vdinh@bancroftpllc.com
Counsel for Crest Financial Limited

Kathleen M. H. Wallman WALLMAN CONSULTING, LLC 9332 Ramey Lane Great Falls, VA 22066 wallmank@wallman.com

Regina M. Keeney Lawler, Metzger, Keeney & Logan, LLC 2001 K Street, NW, Suite 802 Washington, DC 20006 gkeeney@lawlermetzger.com Counsel for Sprint

John R. Feore
Dow Lohnes P.L.L.C.
1200 New Hampshire Avenue, NW, Suite 800
Washington, DC 20036
jfeore@dowlohnes.com
Counsel for Softbank Corp. and Starburst I, Inc. and Starburst II, Inc.

/s/ Angela Y. Kung
Angela Y. Kung
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004
(202) 434-7300